Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-1839

PEDRO ALVAREZ,
Petitioner,
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, PEDRO ALVAREZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 20, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 550 F.2d 1364 and appears in Appendix A (hereinafter cited as "App. A, B, C or D" when followed by a page number), **infra,** pp.15-33. The Court of Appeals denied a Petition for a Rehearing and a Rehearing En Banc on May 24, 1977 without opinion.

No formal opinion was entered by the District Court. Excerpts of the transcript in that Court, which includes pertinent testimony relating to "other crimes" evidence and the introduction of a written statement, are reproduced in Appendix B and C to this Petition respectively. A typewritten copy of the statement is reproduced in Appendix D to this Petition.

JURISDICTION

The Petition for Rehearing and Rehearing En Banc was denied on May 24, 1977. This Petition for Certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Petitioner was tried and convicted under a one-count indictment returned in the United States District Court for the Middle District of Florida which charged a conspiracy to import, possess and distribute marijuana in Florida and New York. The questions presented here relate to evidence adduced during the trial in the District Court, notably:

(1) "Other crimes" testimony intentionally introduced

by the prosecution to put Petitioner's character in issue; and

(2) The admission into evidence of a written statement which was exculpatory of a co-defendant but inculpatory to Petitioner, and the District Court's subsequent denial of the motion for severance under F.R.Crim.P. 14.

The questions thereby arising are:

1. Whether the Court of Appeals for the Fifth Circuit correctly interpreted F.R.Evid. 404(b) in conjunction with the "harmless error" provision of F.R.Crim.P. 52(a).

2. Whether a written statement offered as exculpatory evidence by a co-defendant but which was inculpatory of and prejudicial to Petitioner as a written summary of the government's case was admissible into evidence as a prior inconsistent statement pursuant to F.R.Evid. 613(b).

CONSTITUTIONAL PROVISION AND RULES OF COURT INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

F.R.Evid. 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

F.R.Evid. 613(b) provides as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible un-

less the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d) (2).

F.R.Evid. 801(d) (1) (B) provides in pertinent part as follows:

(d) Statements which are not hearsay. A statement is not hearsay if - -

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . .

F.R.Crim.P. 14 provides in pertinent part as follows:

If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . .for trial together, the court may order . . .a severance of defendants or provide whatever other relief justice requires.

F.R.Crim.P. 52(a) provides as follows:

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

Petitioner and eight other defendants were indicted in the Middle District of Florida, Tampa Division, on October 10, 1975. They were charged with violating 21 U.S.C. §§846 and 963 by conspiring between January and June of 1972 to import marijuana into the United

States from Colombia, South America, possessing the marijuana and distributing it in Florida and New York.

During their trial beginning March 1, 1976, the government called William "Randy" Kilgore as a witness during its case-in-chief. Kilgore was described by the prosecutor as a co-conspirator in the allegedly successful plot to import marijuana. (App. B, p.44) As an unindicted co-conspirator, Kilgore allegedly traveled in a DC-3 airplane to Colombia with Petitioner and co-defendants John L. Wells, Jr. and Paul Rice to obtain a shipment of marijuana.

The "Other Crimes" Testimony

At the beginning of Kilgore's testimony, the prosecutor asked him if he could identify Petitioner. Kilgore did so. (App. B, p. 35) Over objection to its materiality and relevancy, the prosecutor asked Kilgore when he and Petitioner first met. Kilgore testified that his first meeting with Petitioner occurred in 1968 or 1969, some three or four years before the period encompassed by the indictment. (App. B, p. 36) The prosecutor next inquired into the manner in which Kilgore and Petitioner became associated.

"We used to trade guns for dope and . . .", Kilgore replied (App. B, p. 37).

Petitioner's counsel immediately moved for a mistrial to be declared due to the prejudice to Petitioner by the character evidence introduced by Kilgore's "other crimes" testimony. Petitioner's counsel noted that Petitioner had not put his character into issue. (App. B, p. 37) He further argued that the testimony prejudiced Petitioner in two respects. First, the other crime was too nebulous to qualify as aprior similar transaction of any probative value. Second, the exchange of "dope" for guns stated another crime, that of dealing unlawfully in firearms. (App. B, pp. 37,43) Counsel also complained that he was not warned of the "other crimes" testimony so he could prepare to deal with it. (App. B, pp. 43-44)

During a sidebar conference, the prosecutor admitted

that he knew that Kilgore would make the allegation. (App. B, p. 38) The trial court's concern, however, centered on the meaning of "dope" rather than the prejudicial impact of the testimony, its probative value on any material point or the prosecutor's motive in eliciting the testimony. (App. B, pp. 40,46-47) The trial court denied Petitioner's motion for a mistrial. (App. B, P. 47)

After the trial court made its ruling, the jury was instructed to give Kilgore's statement the weight the jury thought it should receive. (App. B, p. 47) When the prosecutor resumed questioning, he asked Kilgore to define "dope" for the jury's understanding.

> A. By, "dope," I meant that we traded for marijuana and hashhish.
>
> Q. Alright.
>
> A. I had the guns and he had the marijuana and hashhish, and I would trade him the guns for that. (App. B, pp. 49-50)

The Court of Appeals found that no need existed for the other crimes evidence to be introduced through Kilgore. That Court also chastened the prosecutor's deliberate use of the testimony as it exhibited a "lack of the appropriate sensitivity to the defendants' substantive rights." (App. A, p. 27)

Yet the Court of Appeals affirmed the conviction, finding the remarks constituted "harmless error" within F.R.Crim.P. 52(a) and **Kotteakos v. United States,** 328 U.S. 750, 764 (1946). (App. A, pp. 27-28)

Kilgore's Written Statement

During Petitioner's cross-examination of Kilgore the government produced a statement which Kilgore allegedly wrote. The prosecution tendered the original handwritten statement and a typewritten copy pursuant to the Jencks Act, 18 U.S.C. §3500. (App. C, p. 52; App. D)

During defendant Massler's cross-examination of Kilgore, Massler's counsel informed the trial court of his intention to offer Kilgore's statement in evidence as Massler's Exhibit No. 1.

Massler's counsel offered the prior written statement of Kilgore because it did not link Massler to the conspiracy, while Kilgore's trial testimony did implicate Massler. (App. C, p. 58) Thus the written statement was exculpatory of Massler and constituted a prior inconsistent statement for impeachment purposes.

Meanwhile, the writing implicated Petitioner by describing the flight to South America and the smuggling of marijuana in detail. Petitioner's counsel brought the conflict to the attention of the trial court and objected to its admission into evidence. (App. C, p. 58) Petitioner's counsel also sought an instruction to the jury for the writing to be disregarded as evidence of the guilt of Petitioner. (App. C, p. 62), as corrected by addendum certificate, App. C, p. 65)

The instruction was not given until the trial court's charge to the jury at the conclusion of all evidence. The instruction given at that point addressed the prior inconsistent statement made by Kilgore in his written statement as compared to his testimony. It did not exclude Petitioner from the statement's evidentiary scope or limit that scope to Massler. (App. A, p. 30)

The prosecutor initially objected to the admission of the writing. (App. A, p. 29) The government's objection was withdrawn later. (App. C, p. 61)

The trial court admitted the writing into evidence pursuant to F.R.Evid. 613(b) over the objection of all defendants except Massler. It was admitted with misgivings as the trial court recognized that the writing was hearsay as to the defendants other than Massler. (App. C, p. 62)

The fact that Massler and not the government offered it, however, convinced the trial court that Kilgore's written statement should be admitted as Massler's Exhibit No. 1. Petitioner immediately moved for severance, which was denied by the trial court. (App. C, pp. 63-64)

The Court of Appeals found no error in the charge on the prior inconsistent statement, the stage at which it was given or the prejudicial impact on Petitioner. (App. A, pp. 29-31)

REASONS FOR GRANTING THE WRIT

I. A CONFLICT EXISTS BETWEEN THE COURTS OF APPEALS IN REGARD TO THE PREJUDICIAL IMPACT OF OTHER CRIMES EVIDENCE AND THE PROPER REMEDY FOR SUCH PREJUDICE.

Petitioner notes at the outset that this Court has not interpreted F.R.Evid. 404(b). Since its implemention, however, Rule 404(b) has received more attention in the courts of appeals than any other rule of evidence with the possible exception of F.R.Evid. 403, a rule with a considerably broader scope. That is, the interpretations of Rule 403 deal with all of the reasons to exclude relevant evidence. Rule 404(b), meanwhile, deals with the narrow but persistent question of the proper use of other crimes evidence.

The quantity of other crimes cases in the courts of appeals is not likely to decline while - - as was the circumstance in the instant case - - the impact of other crimes testimony upon the accused is as great as it is. As is noted in 1 Wigmore, **Evidence** (2d Ed. 1940), §57:

> The deep tendancy of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendancy which cannot fail to operate with any jury, in or out of court.

Thus, Petitioner urges this Court to clarify Rule 404(b) due to the absence of controlling authority for the courts of appeals on a troublesome and recurring question of significant impact on the rights of the accused. The need for such clarification is shown by the conflicts among the courts of appeals.

A. THE COURTS OF APPEALS DIFFER OVER THE PREJUDICIAL IMPACT OF OTHER CRIMES EVIDENCE WHEN ITS USE IS UNWARRANTED.

The Court of Appeals in the case at bar found that no need existed for the injection into evidence of the testimony of Kilgore about Petitioner's alleged prior crimes. (App. A, p. 27) Yet, the Court held that the failure of Petitioner's counsel to accept a curative instruction which was offered by the trial court brought the other crimes testimony within the harmless error rule provided by F.R.Crim.P. 52(a), in light of **Kotteakos v. United States,** 328 U.S. 750 (1946).

In **United States v. Ailstock,** 546 F.2d 1285 (Cir. 1976), the Court found the relationship between the lack of a curative instruction and harmless error to have the opposite result. In **Ailstock,** a prosecution witness testified that the defendant had been imprisoned. Counsel sought no curative instruction and none was given. The Court found the absence of the curative instruction was prejudicial error which mandated reversal. **Ailstock** at 1291. Compare, **United States v. Henson,** 486 F.2d 1292, 1299-1300 n. 6, (D.C. Cir. 1973).

The conflict between the Courts of Appeals for the Fifth and Sixth Circuits illustrates two points. First, the Courts obviously differ in the impact they attribute to other crimes testimony generally since **Ailstock** required the trial judge to give a curative instruction in order to diminish the prejudicial impact of the evidence. Conversely, the Court of Appeals below put the burden on Petitioner. Second, both Courts evidently measure prejudice differently. The testimony sanctioned by the Court below is immeasurably more prejudicial than the general reference to imprisonment in **Ailstock.**

As a result of this conflict, the Courts of Appeals are applying two different standards. The Sixth Circuit is taking a **per se** approach by recognizing the inherently prejudicial impact of other crimes testimony and by requiring a curative instruction to lessen the sting of such evidence. The Fifth Circuit, meanwhile, is using the weighing approach inherent to the harmless error doctrine. Given the impact of the other crimes evidence adduced against Petitioner, he contends that the Court below erred in applying the harmless error

doctrine.

The question for this Court on the merits would be whether the unwawrranted use of other crimes evidence can be effectively weighed at all. In the alternative, the question would be whether the gross misuse sanctioned below is beyond the scope of harmless error as a matter of law. Under either analysis, this Court should eliminate this conflict in the circuits.

B. THE COURTS OF APPEALS CONFLICT ON THE PROPER REMEDY FOR PROSECUTORIAL MISCONDUCT IN THE USE OF OTHER CRIMES EVIDENCE.

The Court of Appeals below found that the prosecution deliberately interjected the needless other crimes testimony of Kilgore into the trial and that it exhibited a "lack of appropriate sensitivity to the defendants' substantive rights. We expressly disapprove it." Despite the finding of prosecutorial misconduct, Petitioner's conviction was affirmed. (App. A, p. 27)

The same result would not have obtained in the Sixth Circuit. In **United States v. Blanton,** 520 F.2d 907, 909 (6th Cir. 1975), the Court reversed and remanded the conviction when a government witness deliberately interjected inferences accusing the defendant of a recent armed robbery, thereby denying him a fair trial. By its finding that the evidence denied defendant a fair trial, the Sixth Circuit evidently placed the use of other crimes evidence on a constitutional level. Thus, the Court fashioned a **sub silentio** exclusionary rule for the use of unlawful evidence, just as this Court has fashioned an exclusionary rule for unlawful seizure of such evidence. While the constitutional question need not be reached by this Court in defining the boundaries of Rule 404(b), the exclusionary rule fashioned by the Sixth Circuit might be the only effective means of discouraging the haphazard use of such evidence. That remedy is a harsh one, but so is the alternative. See **United States v. Coppola,** 526 F.2d 764, 772 (10th Cir. 1975).

On the merits, then, this Court should fashion a consistent rule that would eliminate the anomaly of a

new trial in **Blanton** and affirmance below for the same prosecutorial misconduct.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT IN REGARD TO OTHER CRIMES EVIDENCE.

This Court has supervised the use of other crimes evidence in the Federal System for almost two centuries. **Boyd v. United States,** 142 U.S. 450 (1892); **United States v. Mitchell,** 2 Dall. 348 (1795). Since the Court of Appeals below has sanctioned an unusually wide departure from the course of judicial proceedings - - including the decisions of this Court - - the supervisory power of this Court should be exercised again.

The supervisory power sought by Petitioner relates to this Court's duty to ensure a fair trial. Thus, the case at bar is similar to **Marshall v. United States,** 360 U.S. 310 (1959), in which this Court ordered a new trial for prejudice arising out of newspaper accounts of the defendant's other crimes. The trial court had ruled evidence of the other crimes inadmissible, but seven jurors had read one or two news stories which described criminal acts allegedly committed by the defendant. After the seven jurors told the trial judge that they would not be influenced by the news accounts, he declined to declare a mistrial.

This Court noted that the prejudice to the defendant was "almost certain" to be as great in a news account as it would be in evidence, citing **Michelson v. United States,** 335 U.S. 469 (1948). **Marshall,** 360 U.S. at 312-313. This Court went on to note that the prejudice might be greater through a news account since "it is then not tempered by protective procedures." **Marshall,** 360 U.S. at 313.

That observation does not distinguish **Marshall** from the case at bar since "protective procedures" were not afforded Petitioner below. Indeed, the trial court instructed the jury that it could attach "only such weight as you may think it entitled to receive in relation to all the other testimony and evidence" in

the trial. (App. B, p. 47) In short, no protection was afforded.

The passage of time has not diminished the applicability of **Marshall** to the case at bar as its reasoning was cited with approval in **Murphy v. Florida,** 421 U.S. 794 (1975), which restricted **Marshall** to the federal courts. In **Murphy** this Court refused to extend the presumption of prejudice found in **Marshall** to the states as a matter of due process.

Since this Court can correct the error below in its supervisory capacity or as a matter of interpreting F.R.Evid. 404(b), Petitioner has refrained from seeking a due process determination under the Fifth Amendment. The facts of this case, however, are sufficiently gross and inappropriate to elevate this Court's attention to the constitutional threshold.

This Court has found inherent prejudice where evidence of a prior conviction is introduced into evidence when the conviction was void under **Gideon v. Wainwright,** 372 U.S. 335 (1964). **Burgett v. Texas,** 389 U.S. 109, 115 (1967). Petitioner in the case at bar was not confronted with a void conviction. But the other crimes charged against him in the testimony of Kilgore are no less inherently prejudicial since they permit him to be punished for a crime he is not charged with committing. Comment, **Other Crimes Evidence At Trial: Of Balancing And Other Matters,** 70 **Yale L. J.** 763 (1961).

Since the Court could well consider the instant case on a constitutional level, review as a matter of supervising the lower federal courts, is, **a fortiori,** appropriate. In light of the clearly abusive and inherently prejudicial use of other crimes evidence in the case at bar, such review is also mandated.

III. THE COURTS OF APPEALS CONFLICT ON THE QUESTION OF WHETHER A WRITTEN CONDENSATION OF THE GOVERNMENT'S CASE IS ADMISSIBLE IN EVIDENCE.

The Court of Appeals below gave scant attention to the question of whether Kilgore's written statement could be admitted into evidence on the motion of co-defendant Massler when it constituted a written condensation of the government's case. (App. A, pp. 29,31) The Court of Appeals did not discuss that facet of Massler's exhibit, relying instead on the trial court's interpretation of F.R.Evid. 613(b).

The trial court's interpreted Rule 613(b) to permit admission of Kilgore's writing as a prior inconsistent statement. The statement, meanwhile, was also a "neat condensation of the government's whole case against the defendant(s)." **United States v. Ware,** 247 F.2d 698, 700 (7th Cir. 1957). This Court has never interpreted Rule 613(b). The conflict occasioned by that rule in the circuit courts of appeals requires a definitive determination of this troublesome procedural point.

The prohibition in **Ware** against a written synopsis of the prosecution's case has been followed in other circuits. **United States v. Frattini,** 501 F.2d 1234 (2d Cir. 1974), **Sanchez v. United States,** 293 F.2d 260 (8th Cir. 1961). But see, **United States v. Jones,** 491 F.2d 526 (8th Cir. 1973), cert. denied 417 U.S. 970 (1974), **United States v. Parker,** 491 F.2d 517 (8th Cir. 1973). Indeed, the Fifth Circuit relied on **Ware** in **United States v. Brown,** 451 F.2d 1231, 1234 (5th Cir. 1971). The implicit overruling of **Brown** by the Court below and the Court's reliance on Rule 613(b) in doing so indicates a misconception of that rule. It also demonstrates the conflict created between the case at bar and **Frattini, Sanchez** and **Ware, supra.**

Petitioner has no argument with the admissibility of a written prior inconsistent statement. **Gordon v. United States,** 344 U.S. 414 (1953). In **United States v. Smith,** 521 F.2d 957 (D.C. Cir. 1975), the Court of Appeals held that the defendant was entitled to have a police report admitted into evidence as a business record pursuant to 28 U.S.C. §1732(a), regardless of how the Federal Rules of Evidence are construed. **Smith** at

969. Petitioner's argument, however, centers on the admissibility of a written statement when it sets forth a "neat condensation" of the government's case, thus providing the jurors with a persuasive writing for reference during their deliberations. Kilgore, in short, accompanied the jury and gave testimony during its deliberation.

The fact that the government did not introduce the statement or move for its admission is immaterial. The reason for excluding such comprehensive writings is the avoidance of prejudice to the defendant. Whether the government or a co-defendant prejudices Petitioner by seeking admission of the "neat condensation" is a distinction without a difference. Besides, the government became an interested party to the evidentiary conflict between the defendants when it withdrew its initial objection to the admissibility of the writing and paved the way for its admission.

Even if the government had no part in admitting the writing, its admission set up an irreconcilable conflict between Massler and his co-defendants. **Schaffer v. United States,** 362 U.S. 511, 516 (1960), emphasized that a trial court should grant a severance during any stage of a trial if a showing of prejudicial misjoinder appears within the meaning of F.R.Crim.P. 14.

The trial court expressed the opinion that, even if the writing were inadmissible as a prior inconsistent statement, it could be admitted as a prior consistent statement on the government's motion. (App. C, pp. 62-63) That reasoning does not provide a justifiable alternative for admitting the writing. Kilgore could not remember when he wrote the statement. (App. C, P. 57) Nor could he explain why it was dated two months before the conspiracy allegedly began. (App. C, p. 57) His recollection for writing the statement was limited to his motive -- he wrote it at the request of law enforcement officials. (App. C, p. 57)

As a result of Kilgore's testimony, the writing would not be admissible as a prior consistent statement in accordance with F.R.Evid. 801(d) (1) (B), contrary to

the opinion of the trial judge. (App. C, pp. 62-63) That is, Kilgore was acting in conjunction with law enforcement officials. Absent a change in motive or circumstances, prior consistent statements are no more than repetitious. They do not support an inference of veracity. 4 Weinstein & Berger, **Weinstein's Evidence,** 801-100 (1975) [citing] **Coltrane v. United States,** 418 F.2d 1131, 1140 (D.C. Cir. 1969).

Therefore, since the Court of Appeals below relied on Rule 613(b) and thereby created a conflict in the courts of appeal over the question of whether that rule permits the admission of a "neat condensation of the government's whole case," this Court should issue the Writ of Certiorari to provide a controlling interpretation of the rule and resolve the conflict.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the Court of Appeals for the Fifth Circuit.